UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

AIM AEROSPACE SUMNER, INC.,	)		
	)		
Respondent	)		
	)	Case Nos.	19-CA-203455
And	)		19-CA-203586
	)		
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 751,	)		
	)		
Charging Party	)		

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES AIM Aerospace Sumner, Inc., Respondent or AIM herein, and files its answering brief to the cross-exceptions filed by the General Counsel, as follows.

STATEMENT OF CASE

This case arises out of an effort by employees employed at AIM's Sumner, Washington facility to oust the International Association of Machinists, District 751, (Union) as their exclusive bargaining representative. The effort culminated in a majority of unit employees signing a petition declaring that they no longer wished to be represented by the Union. The petition was presented to Respondent, and after reviewing and validating the petition, Respondent announced on July 24, 2017,[1] that it was withdrawing recognition from the Union. The General Counsel issued a consolidated complaint alleging that AIM committed certain unfair labor practices, including unlawfully withdrawing recognition from the Union. The matter was heard before Administrative Law Judge Eleanor Laws on February 13, 14, and 15, 2018, in

[1] All dates are 2017 unless otherwise indicated.

Seattle, Washington. On May 16, 2018, Judge Laws issued her decision, in which she dismissed all of the allegations of the consolidated complaint, save one. Specifically, the Judge found merit to the allegation that Respondent violated §§ 8(a)(1) and (3) of the Act by promoting Lori-Ann Downs-Haynes to a receiving clerk position. The Charging Party subsequently filed timely exceptions, which contained a supporting brief. Neither the General Counsel nor Respondent filed exceptions; however, both subsequently filed timely cross-exceptions and supporting briefs. Respondent now files its Answering Brief to General Counsel's Cross-Exceptions.

STATEMENT OF FACTS

A. Background

Respondent operates three facilities in the Seattle, Washington area, where it manufactures composites and ducting for the aerospace industry. These facilities are located in Auburn, Renton, and Sumner, Washington. (Tr. 25-26). Prior to 2013, all three facilities operated on a nonunion basis. In 2013, Sumner employees initiated a campaign seeking to obtain Union representation. According to unrefuted testimony from former Union steward Jim Dildine, he and other Union supporters sought to sign up members and campaign for the Union on a daily basis, and they did so principally during working time. They made signs, passed out buttons, and blew solidarity whistles throughout the work day. On one occasion, during break time, Union supporters marched through the plant blowing whistles and carrying signs. These activities continued even after the Union was certified. (Tr. 243-248).

Negotiations between AIM and the Union ultimately succeeded, and the parties agreed to a four-year collective bargaining agreement (CBA), effective from April 25, 2014 through May 1, 2018. (Jt. Exh. 2). The CBA contained a negotiated wage scale (Appendix B), which provided for three-year progressions within each classification (Manufacturing, Quality, Support) and

$0.10 annual increases to the various progressions. Section 7.05 granted the Company discretion, for legitimate business reasons, to "pay an employee above the rates in this Agreement." AIM has never relied upon this provision to grant any employee an above-scale wage rate, nor has the Union ever made a request for a wage increase. (Tr. 365-366).

C. Alleged Blaming of Union For Lack of Wage Increases

Union steward Guisseppe Mercado testified that in March he had a conversation with supervisor Rob Anderson. At the time, Mercado had grown a beard for the purpose of avoiding being asked to paint. The beard prevented use of a respirator, which precluded Mercado from painting. On this occasion, Anderson questioned Mercado as to why he no longer wanted to paint. Mercado responded that he did extra work but got the same raises as all other employees, even the lazy ones. Anderson responded that "because you're in a union and we have a contract, we can't pay you more." Mercado stated that that was "a lie" and that the contract gave the Company the discretion to pay more if it so desired. Mercado offered to show Anderson the contract language, but Anderson declined, and the conversation turned to other matters, (Tr. 141-142). On a date Mercado could not specify, he had a similar conversation with manager Bill Keilman. On this occasion, Mercado was clean shaven, and Keilman asked why he was not painting. Mercado responded as he had with Anderson, and Keilman replied that "because you've got a union contract, we can't pay you more." Mercado again referenced the provision in the contract giving the Company discretion to pay employees above scale for legitimate business reasons. Keilman responded that the Company had a new vice president and Mercado should be patient. (Tr. 145-146).

Union steward James Herness testified that around July 20 or 22, he went to the new Human Resource Manager Debbie Ruffcorn's office to drop off two grievances. No one else was

present. Ruffcorn asked what the grievances were about, and Herness responded that they related to pay discrepancies. Ruffcorn stated that there seemed to be a lot of pay issues. Herness replied that employees were not paid much, that their requests for pay increases were denied, and that they got upset when their pay was incorrect. According to Herness, Ruffcorn got a confused look on her face and said that she thought the contract precluded any further raises. Herness then referenced the contractual provision authorizing the Company to give increases "for legitimate business reasons." Herness offered to show Ruffcorn the pertinent contract language, but she "brushed her hand away to dismiss it." (Tr. 46-47).

D. Employees Cole and Downs-Haynes Start Employee Petition

In mid-June, several employees decided to initiate an effort to remove the Union as the employees' bargaining representative. The two primary leaders were Becky Cole and Lori-Ann Downs-Haynes. Cole testified that she had never supported the Union and had been waiting for the opportunity to oust the Union for a few years. According to Cole, employees were expressing dissatisfaction with the Union and what employees were receiving for their monthly dues. Cole had hoped that other employees would take the lead, but when they didn't, she and Downs-Haynes began discussing doing it themselves. Cole previously had worked at an employer where the union had been decertified and she was somewhat familiar with the process. Cole also did some research on the internet, where she found a sample decertification petition. Cole was reluctant to actually solicit signatures on the petition, and it was agreed that Downs-Haynes would take the lead in getting the petition signed. (Tr. 258-263, Resp. Exhs. 3, 4). Downs-Haynes testified that she joined the Union after it was voted in because she had been told that she needed to join in order to maintain her job. At a later point in time, she learned that this was not true. Downs-Haynes testified that she was displeased with the Union and the fact that the dues

kept going up, which caused a hardship for her as she was a single mother with two children. [2] In talking with other employees, Downs-Haynes learned that there were others who felt as she did, and in June and July, she and Cole discussed starting a petition. Cole handled the paperwork, and Downs-Haynes solicited signatures on the petition. (Tr. 276-283).

There is no allegation or evidence that any supervisor or manager distributed the petition, solicited any signature, encouraged any employee to sign the petition, or provided any active assistance to the employees leading the decertification effort. The last two signatures on the petition were collected on July 20. Cole attempted on three occasions to discuss the petition with the Board's regional office. On the third occasion, Cole advised the Board agent that she had more than 50% signed up, and the Board agent gave her step-by-step instructions for filing the petition. The agent also advised that sometimes the Company would accept the petition. Cole then contacted Booth to see if AIM would accept the petition. Booth confirmed that AIM would accept the petition, and on July 21, Cole presented the petition to Ruffcorn. (Tr. 263-266, 415-416). The petition stated that the "undersigned employees . . . do not want to be represented by IAM Local 751." The petition further requested that AIM withdraw recognition from the Union if it determined that the petition was signed by a majority of unit employees. (Jt. Exh. 1).

That same day, Ruffcorn undertook to analyze the petition. Specifically, Ruffcorn (1) compared each signature to an exemplar in AIM's files to verify authenticity, (2) eliminated duplicate signatures, (3) reviewed a list of current employees to determine whether the signers were still employed, and (4) counted the number of valid signatures to determine whether the petition was in fact signed by a majority of unit employees. Ruffcorn updated this analysis on Monday, July 24, 2017. She determined that as of that date, there were 142 valid signatures out

[2] The Union's monthly dues increased to $49.95 in 2016 and to $50.60 in 2017. (Resp. Exh. 10).

of a total unit of 272 employees. (Tr. 416-423; Resp. Exhs. 13, 14). Based on its determination that the Union had lost majority support, AIM notified the Union on July 24, that it was withdrawing recognition effective immediately. (Resp. Exh. 15).

E. Downs-Haynes Seeks and Is Awarded Receiving Clerk Position

On or about May 21, Respondent posted a position opening for a receiving clerk. Consistent with prior practice, Respondent posted the position on a software program known as "Birddog HR." It then posted the position by the time clocks in the facility. On or about June 6, Respondent offered the job to Ervin Taylor, an external candidate. Taylor accepted the position and began work on June 12. After two weeks, however, Taylor stopped showing up, and the job was reposted on or about June 29. (Tr. 430-432, Resp. Exh. 19).

Following the initial posting, on or about June 4, Downs-Haynes had filed an on-line application seeking the receiving clerk position, and had completed a request for transfer on June 6. (Resp. Exh. 5). Ruffcorn testified that she did not become aware of Downs-Haynes' request until after Taylor had been offered the job. (Tr. 433). Accordingly, she had not been considered in the initial hiring process. However, when Taylor left, Respondent decided to look first at the internal candidates, of whom there were only two, Downs-Haynes and Laura Hobbick. Respondent had not initially interviewed Hobbick, as she had no shipping/receiving experience, but with the reposting of the position, Respondent interviewed both Hobbick and Downs-Haynes. Ruffcorn interviewed Hobbick on June 30. During this interview, Hobbick indicated that she was more interested in an engineering position. (Tr. 434-435, Resp. Exh. 20). Ruffcorn interviewed Downs-Haynes on July 6. Downs-Haynes was specifically interested in shipping/receiving, and she had prior experience. She also indicated that she had filled in at AIM when shipping/receiving needed help. (Tr. 436-437; Resp. Exh. 21). Ruffcorn discussed the

matter with the shipping/receiving supervisor, who agreed that Downs-Haynes should be offered the position. (Tr. 438-440; Resp. Exh. 22). On July 11, Respondent offered the job to Downs-Haynes. Her rate of pay was adjusted from the top manufacturing rate of $13.60 to the top support rate of $14, in light of her prior shipping/receiving experience. (Tr. 440-442).

ARGUMENT

A. AIM Did Not Unlawfully Blame Union for Lack of Wage Increases

Paragraph 10 of the consolidated complaint alleges that supervisors Keilman, Anderson, and Ruffcorn violated § 8(a)(1) of the Act by telling employees "that the Union was to blame for employees not receiving raises." The General Counsel challenges the ALJ's dismissal of these allegations. [Exceptions 7-12]. For the most part these challenges echo the Union's argument, which are addressed in Respondent's Answering Brief to Charging Party's Exceptions.

The statements attributed to the three managers do not even arguably rise to the level of coercive conduct that would violate § 8(a)(1). Mercado and Herness both acknowledged that their conversations with the different managers arose in the context of each employee complaining that he should receive an above-scale raise because he was a hard and industrious worker in comparison to other employees. On each occasion, the manager referenced the CBA wage scale as being binding, and on each occasion, the steward responded that the contract gave management discretion to grant above-scale increases to individual employees for legitimate business reasons. What is absent is any testimony indicating that the managers threatened to withhold an increase to which employees were entitled or stated or implied that they would receive an increase if the Union were no longer present. The two stewards acknowledged that the contractual language upon which they relied was purely discretionary. Section 7.05 of the CBA merely permits AIM to address individual situations where there are unique circumstances. This

discretion included the discretion not to grant individual increases. The Union never filed any grievance or charge over the failure to grant an increase, and as far as the record indicates, never requested to bargain over an additional wage increase. (Tr. 61).

The General Counsel's criticism of the Judge's legal analysis is unpersuasive. As the Judge found, the cases cited by the General Counsel all involve entirely different conduct. In *First Student, Inc.*, 359 NLRB 208, 222 (2012), the Board found that the employer violated § 8(a)(1) by telling employees during negotiations for a first contract that "there would be no raises while bargaining was ongoing." Further, the employer discontinued established step increases while bargaining was ongoing. Because these increases were part of the dynamic status quo, the employer violated the Act both by failing to continue the step increases and threatening employees that the employer would not give them. In *Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987), the employer violated § 8(d) of the Act by unlawfully refusing to sign an agreement that had been reached. Thereafter, it withdrew recognition from the union without any evidence that the union had lost majority support. The "blame" issue arose as a result of a strike assessment that the Union imposed on employees. Instead of making weekly deductions as requested by the union, the employer made the deductions in a single lump sum. When employees expressed anger at the large deduction, the employer stated that it merely did what the union had directed it to do, that its hands "were tied," and that if the employees no longer wanted the union, the employer could do something about it. *Id.* at 959-960. In this context, the Board found that the employer "created animosity through its lump sum deduction of the Union's strike assessment." *Id.* at 971. In *Equipment Trucking Co.*, 336 NLRB 277 (2001), *the complaint specifically alleged, and the Board found, that two employees acted as agents of the employer in attempting to decertify the union.* The employer authorized the employee agents to circulate a

decertification petition with promises of a specific wage increase and additional benefits if they ousted the union. Upon receipt of the petition, the employer immediately withdrew recognition and granted the promised increases. *Id.* at 285-286.

Unlike these cases, Respondent did not grant or promise any benefit and did not withhold or threaten to withhold anything to which employees were entitled. The managers merely alluded to the contractual wage scale. There are no allegations that AIM representatives actually circulated the petition or made any promises regarding what would occur if the employees decertified the Union, and *the complaint does not allege that Downs-Haynes was acting as an agent of AIM.* Whatever promises she may or may not have made were entirely of her own doing and there is no legal basis for attributing them to AIM.

The Board decisions cited in the General Counsel's supporting brief fare no better. In *Jensen Enterprises, Inc.*, 339 NLRB 877, 877 (2003), the employer told employees that if the union came in, wages would be "frozen" throughout negotiations. In *Webco Industries, Inc.*, 327 NLRB 172, 173 (1998), *enf'd*, 217 F.3d 1306 (10th Cir. 2000), the employer unlawfully disciplined/discharged four employees and then told employees (falsely) that the Union was responsible for these unlawful employment decisions. In *Ekstrom Electric, Inc.*, 327 NLRB 339, 355-356 (1998), during the course of negotiations, the employer falsely told employees that it was restricted from giving wage increases and that the Union refused to allow it to grant larger Christmas bonuses than what the employer provided. These decisions bear no similarity at all to this case. Respondent took no unlawful action and it neither threatened to withhold anything that employees were entitled to receive nor promised to provide anything that employees were not entitled to receive.

The evidence is best understood as reflecting a discussion between two knowledgeable

Union stewards and various managers over the significance of certain contractual language and why neither steward had received an above-scale increase. The managers stated that the contractual wage scale controlled, while the stewards argued that they could and should receive individual increases pursuant to Article 7.05. Section 8(c) of the Act clearly protects these type conversations between managers and employees. Even assuming, *arguendo*, that the managers misunderstood or misrepresented the terms of the CBA, no violation of the Act can be found. The Board has held that it will not overturn an election or find an unfair labor practice based on a simple misrepresentation. *Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982); *accord, Great Dane Trailers Indiana, Inc.*, 293 NLRB 384, 401 (1989) ("Although Respondent misrepresented to its employees that they could be fined by the Union for attempting to decertify it, these misrepresentations are not objectionable conduct under [*Midland National*]").

Although not addressed by the Judge, Section 7.05 of the CBA is a "permissive" subject of bargaining because it authorizes AIM to bypass the Union and deal directly with employees on wages. It is well established that a party may, at any time, unilaterally rescind any permissive term of a contract without violating § 8(a)(5). *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-186 (1971). In *KFMB Stations,* 349 NLRB 373 (2007), *rev. den.*, 301 Fed. Appx. 730 (9th Cir. 2008), the Board held that an employer who had paid an employee above scale pursuant to a contractual provision permitting the employer to deal directly with employees lawfully reduced the employee's wages down to scale. Further, *the employer did not violate the Act or taint a decertification petition by specifically casting blame on the union for the reduction.*

Respondent requests that the ALJ's dismissal of these allegations be adopted by the Board.

B. The Alleged "Blame" Statements Were Not Made to Anyone Who Signed The Petition.

Even if the Board were to agree that the statements made by Keilman, Anderson, and Ruffcorn regarding the CBA and wage increases were violations of § 8(a)(1), which they clearly were not, the statements were not made to any employee who actually signed the decertification petition. The only employees who heard these statements were the two Union stewards, neither of whom signed the petition. Thus, the General Counsel's extended argument that Respondent "fomented disaffection" with the Union, thereby causing the petition to be circulated, is plainly without merit. This defect is fatal to the General Counsel's argument. *Raley's,* 357 NLRB 880, 884 (2011) (no evidence "to reasonably conclude that a determinative number of employees had been coerced into signing the UWRU's authorization petition"); *Quazite Corp.*, 323 NLRB 511, 512 (1997) (threatened employees did not sign petition).

C. Respondent Did Not Selectively Enforce Its No-Solicitation Policy

The General Counsel devotes three pages of his supporting brief to the contention that Respondent selectively enforced its no-solicitation policy. (Brief at 7-10). The consolidated complaint, however, makes no such allegation. As Respondent argued to the ALJ, the evidence offered in regard to the alleged solicitation of signatures during "working time" was relevant only insofar as it tended to demonstrate that Respondent granted Downs-Haynes "greater access" to employees. (Tr. 21-23). In fact, however, there is a dearth of evidence that Downs-Haynes collected any signature during working time, much less that management knowingly allowed her to do so. That the General Counsel even advances this argument is indicative of his unwillingness to accept that employees have as much of a statutory right to oppose a union as they do to support a union. Had Downs-Haynes been engaged in activities in support of the Union and had AIM attempted to clamp down on those activities, the General Counsel

undoubtedly would be taking a much different position. It is well established that the workplace is "a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal citation omitted). The workplace is "uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to employees." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). Any rules imposed must be reasonable and must be rigidly enforced. Any inconsistency in a rule's enforcement will preclude its enforcement against § 7 activity. *St. Vincent's Hospital*, 265 NLRB 38, 38-41 (1982), *enf'd pert. part*, 729 F.2d 730 (11th Cir. 1984). Moreover, an employer who maintains a no-solicitation rule is under no legal obligation to enforce the rule against § 7 activity, provided he does not discriminate between pro-union and anti-union activity. Here, the no-solicitation rule was never enforced against pro-union activity, and in 2013, rampant pro-union activity occurred during working time.

Importantly, *talking about a union* (or any other subject) does not constitute "solicitation." *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enf'd*, 582 F.2d 1118 (7th Cir. 1978). An employer may not lawfully prohibit talking about a union unless it prohibits talking about any subject. *Sam's Club*, 349 NLRB 1007, 1009 (2007). AIM has no such rule. The only act that constitutes "solicitation," which an employer lawfully may prohibit during "working time," is actually handing a card or petition to an employee and requesting that the employee sign the card or petition on the spot. There must be actual distraction from work. *Pac. Coast M.S. Indus.*, 355 NLRB 1422, 1438 (2010); *Wal-Mart Stores, Inc.*, 340 NLRB 637, 638-639 (2003),

enf. den., 400 F.3d 1093 (8th Cir. 2005). Talking about a union card or petition or asking an employee if he/she is interested in signing a union card or petition is not "solicitation."

Measured against the appropriate legal standard, the evidence proffered by the General Counsel falls woefully short of what would have been necessary for AIM to enforce its no-solicitation rule against Downs-Haynes or any other employee. Not a single witness testified to any occasion where Downs-Haynes actually presented the petition to any employee for signature during working time or in any work area. Most of the General Counsel's evidence related to activities by Downs-Haynes in break areas, the parking lot, or exterior break areas such as the smoking shack. Downs-Haynes had a statutory right to carry out these activities, *Sheet Metal Workers International Assoc., Local 18,* 314 NLRB 1134, 1135 (1994) (employee, "in petitioning for decertification, clearly engaged in statutorily protected activity"), and AIM lacked any legal basis to shut her down, as the Union stewards seemed to believe was appropriate.

The rest of the General Counsel's evidence, even if fully credited, establishes only that on isolated occasions, Downs-Haynes may have approached other employees who were working and questioned them briefly about their feelings regarding the Union and their possible interest in signing Downs-Haynes' petition. Such conversations, if they occurred, did not violate the no-solicitation rule or any other rule. While Respondent discouraged excessive talking insofar as it disrupted work, it did not maintain a no-talking rule, and union supporters frequently discussed the petition among themselves during working time. The sole written warning in the record is one that was issued to Craig Beder in early 2014. (Resp. Exh. 1). This warning was issued only after Beder was talked to on multiple occasions about being out of his work area engaged in non-work tasks, and did not involve union activity of any kind. (Tr. 197-199). When supervisors observed employees wasting time with "excessive" talking or otherwise, their practice was to

break up the conversation and direct the employees to get back to work. (Tr. 53-54, 85-88, 161, 178-182, 188-189-190, 204). There is no evidence that Downs-Haynes engaged in "excessive" talking during working time and no evidence that any supervisor observed her disrupting work.

D. Respondent Did Not Grant Downs-Haynes "Greater Access."

Paragraph 6 of the consolidated complaint alleges that in June and July 2017, AIM granted Downs-Haynes "greater access to employees in the shop at the facility." The ALJ rejected this contention, and there is no probative credited evidence to support this allegation. The General Counsel's contention that in late June 2017, Respondent aided Downs-Haynes in gathering signatures by transferring her from autoclave to "lay-up room 1," thereby granting her access to a greater number of employees is completely refuted by the record. Downs-Haynes was moved to duct layup on June 19, 2017—nine days before the first signatures were collected on the petition. (Resp. Exh. 6). This temporary transfer was made at the request of the duct layup supervisor (Donna Shaw), who needed help, and Downs-Haynes had relevant experience. Further, another employee was temporarily moved from autoclave to duct layup around the same time. (Tr. 337-339). Downs-Haynes was an actual *employee* of AIM who had a right to access the facility where she worked in order to communicate with co-workers in support of, or in opposition to, a union. Indeed, the record fails to establish that Downs-Haynes had any greater access to employees in duct layup than she had in autoclave.

Further, following the Union election in 2013, the Union filed unfair labor practice charges challenging a number of AIM's handbook policies, including its access policy. As part of an informal settlement agreement, Respondent revised its policy so as not to preclude employees from accessing the premises during non-scheduled time. (Tr. 363-365; Resp. Exhs. 8, 9). The revised rule states: "Employees are not allowed inside any AIM facility other than during

their normal work schedule or scheduled overtime." (R. Exh. 25, p. 11). Thus, there are no restrictions whatsoever on an employee's (whether on-duty or off-duty) ability to access the exterior parking lot, break areas, and smoke shacks. As the General Counsel's own evidence reflects, Downs-Haynes approached many employees in these exterior areas of the plant either during her break time or before and after work as employees arrived at and departed from the facility. (Tr. 80-81, 91, 158-159, 225-226). Union steward James Herness engaged in similar activities in support of the Union. (Tr. 64-65, 68).

With respect to the interior of the facility, although the rule prohibits access when an employee is not scheduled to work, it is undisputed that as a matter of established practice, many employees arrive at the facility as much as an hour before their scheduled work time to relax, drink coffee, listen to music, play games on their phones, and socialize with co-workers. At least insofar as these activities occur in the break rooms and other non-work areas, they have never been prohibited. (Tr. 54-55, 205). Much of the General Counsel's evidence reflects that Downs-Haynes accessed non-work break areas to talk with employees during normal break time, as well as before and after work. (Tr. 35-36, 101-103, 202-203, 212-213). Union steward James Herness engaged in similar activities in support of the Union. (Tr. 35-36).

There is no direct evidence that Downs-Haynes accessed interior work areas of the facility during her non-scheduled time in order to talk with other employees. Union steward Mercado testified to a conversation that occurred between the paint booths around 6:15 a.m. on one morning, (Tr. 131-132), and Rodney Christian testified to a conversation as he was walking through the facility near the break room around 5:30 a.m. one morning. (Tr. 175-176, 185-186). Downs-Haynes' time records, however, reflect that her starting time was not always consistent. Some days she started at 6:30 a.m., and on other days, she came in early at 5:30 a.m. to work

overtime. (R. Exh. 26). Thus, it is unknown whether Downs-Haynes was "off duty" on these occasions. In any event, there is no evidence that any supervisor observed Downs-Haynes on these two occasions. Further, Downs-Haynes was instructed by Ruffcorn and Booth on June 30, that she could not bother 2nd and 3rd shift employees. (Tr. 408-409; Resp. Exh. 11).

There is only very limited evidence that Downs-Haynes engaged in anti-union activities outside her work area during scheduled working time. Christine Westover testified to two brief conversations in which Downs-Haynes approached and asked to get her petition back. Westover did not identify any supervisors in the area. Corrine Peterson testified that she observed Downs-Haynes talking to "Dave," as well as with an employee in the bathroom, but employees were free to use the bathroom as necessary, and it is not clear whether Downs-Haynes had a work reason for talking to Dave or even what subject was being discussed. Nor was there any evidence that any supervisor observed these activities.

The sum total of the evidence of supervisor knowledge of Downs-Haynes' activities was Peterson's testimony that (1) supervisor Kendrick James observed Downs-Haynes walking by and commented that he could not stop her and (2) Donna Shaw stated that she did not care what Brenda Sellers and Downs-Haynes talked about. Even if James made such a statement, its significance is elusive. Downs-Haynes did in fact have a right to seek to oust the Union and James had no right to "stop her." Peterson's testimony fails to establish exactly why Downs-Haynes was walking by and fails to establish that she was interfering with anyone's work. Thus, James had no reason at all to intervene. As for Shaw's remark that she did not care what Sellers and Downs-Haynes talked about, this was an unremarkable observation given that Sellers remained Downs-Haynes' supervisor and had every reason and right to talk to Downs-Haynes, and Peterson had no first-hand knowledge as to what they discussed. In summary, there is a

dearth of evidence that Respondent granted Downs-Haynes greater access to the facility than other employees enjoyed. [Compare Corrine Peterson: I "can come and go as I please." (Tr. 100)].

The sole case cited to support this allegation, *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992), is wholly inapposite. In *Ernst*, the union represented a single unit of employees in 24 separate facilities. The evidence reflected that the employee leading the decertification effort was *granted access to facilities where she was not employed in order to solicit employee signatures*. At the same time, the employer discontinued its established practice of permitting union representatives to access the stores and to speak with employees on the sales floors and restricted such representatives' access to breakrooms and lunchrooms. In this context, the Board agreed that the employer "violated Section 8(a)(1) of the Act by granting [the employee] greater access to employees on the sales floor than that enjoyed by the Union's representatives." *Id.* at 850. Unlike *Ernst*, Downs-Haynes was not granted access to any facility other than the one where she worked, and there is no evidence that Union representatives were denied access to the premises or that their access rights as set forth in Article 4 of the CBA were modified in any respect. The ALJ properly dismissed the "greater access" allegation. (JD 14-15).

E. Respondent Did Not Assist or Encourage the Petition

In assessing whether an employer unlawfully assisted a decertification petition, "the essential inquiry is whether 'the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.'" *Eastern States Optical Co.*, 275 NLRB 371, 372. Mere "ministerial" aid does not violate the Act as long as the employees are acting out of their own free will. *Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001). There is no evidence

that Respondent provided any assistance. In fact, the managers were instructed to take a neutral position on any effort by employees to decertify. (Tr. 402-403).

The General Counsel argues that Respondent's unlawful assistance is demonstrated by certain post-withdrawal comments regarding the petition. The ALJ, however, discredited Mercado's testimony regarding managers allegedly making signs of approval at the July 25 meeting. (JD 15: 43 – 48; 16: 1-3). Further, although the ALJ credited Peterson's testimony that she overheard Ruffcorn tell Downs-Haynes that she "had her back" and everything would be okay, she properly observed that there was no context provided from which one could even determine the subject matter of the discussion between the two. (JD 16: 10-22). Thus, the General Counsel's contention lacks any factual support.

Further, the Board decisions cited by the General Counsel are distinguishable. In *Warehouse, Inc.*, 216 NLRB 216, 220-221 (1975), there was extensive employer involvement in the petition, including that a supervisor congratulated an employee after learning that the employee had signed the petition. The same supervisor also asked employees to give the company a chance and watched while two employees signed the petition. In *Overnight Transportation Co.*, 336 NLRB 387, 391-392 (2001), the employer directed the employees to start the petition and encouraged it. In *Mickey's Linen & Towel Co.*, 349 NLRB 790, 791 (2007), the supervisor translated for employees who were soliciting signatures, witnessed employees signing, and interrogated employees regarding their support for the Union. In *Architectural Woodwork Corp.*, 280 NLRB 930, 934 (1986), the employer actively campaigned in favor of the decertification petition. [3] None of these decisions are of any assistance to the General Counsel.

[3] *Narricot Industries, L.P.*, 353 NLRB 775, 776 (2009) was a two-member Board decision, and, in any event, the employer there supervised the distribution of the petition.

The ALJ properly rejected this contention.

F. Respondent's Alleged Unfair Labor Practices Did Not Taint The Petition.

The General Counsel argues that the Judge erred by finding that the unlawful promotion of Downs-Haynes did not taint the petition. This argument is without merit.[4] "Evidence in support of a withdrawal of recognition 'must be raised in a context free of unfair labor practices *of the sort likely*, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'" *LTD Ceramics, Inc.,* 341 NLRB 86, 88 (2004) (internal citations omitted), *enf'd,* 185 Fed. Appx. 581 (9th Cir. 2006). Except where the unfair labor practice involves a general refusal to recognize and bargain, "there must be *specific proof of a causal relationship* between the unfair labor practice and the ensuing events indicating a loss of support." *Id.* The criteria include: "(1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union." *Id.*

Here, Downs-Haynes was not notified that she was awarded the position until July 11, some thirteen days after she began circulating the petition and after she herself signed the petition. Thus, receiving this position clearly did not cause her to undertake her decertification efforts. Further, the only other employee who was impacted either positively or negatively by the decision was Hobbick, and she signed the petition on July 7, some four days before the job was awarded to Downs-Haynes. Thus, she clearly was not influenced one way or the other by the

[4] Respondent has filed cross exceptions to the Judge's finding that the promotion of Downs-Haynes violated the Act. The merits of that finding are addressed in the supporting brief. For purposes of this discussion, Respondent assumes, *arguendo,* that the promotion violated the Act.

award of this position to Downs-Haynes. No other employees were impacted in any fashion, and there is no evidence that anyone knew what rate of pay Downs-Haynes was receiving. In these circumstances, there is nothing in the record that would support a finding of taint. As the ALJ observed, "it is difficult to see how this one personnel action would cause employees disaffection from the Union, particularly considering only two internal candidates applied for the position. The other employees were not privy to the quality or quantity of the other applicants, so they would have no basis for assessing whether or not Downs-Haynes was legitimately selected." (JD 21: 19-22). The General Counsel cites no evidence that would contradict this finding. In essence, his argument boils down to the proposition that any unfair labor practice committed while a decertification petition is circulating "per se" taints the petition. The Board has rejected this theory, and the Judge's finding that the petition was not tainted should be adopted by the Board.

CONCLUSION

Respondent requests that the consolidated complaint be dismissed in its entirety.

Respectfully submitted this 11th day of July 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day, I served the foregoing ANSWERING BRIEF on the following parties of record by electronic mail:

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